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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

THE BALTIMORE & OHIO RAILROAD COMPANY, CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY, CHICAGO & ERIE RAILROAD COMPANY, GRAND TRUNK WESTERN RAILWAY COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, AND THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILROAD COMPANY, appellants,

v.

UNITED STATES OF AMERICA, THE NEW YORK CENTRAL RAILROAD COMPANY, CHICAGO RIVER AND INDIANA RAILROAD COMPANY, THE CHICAGO JUNCTION RAILWAY COMPANY, THE CHICAGO JUNCTION RAILWAYS AND UNION STOCK YARDS COMPANY, AND RICHARD FITZGERALD, appellees.

No. 489.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

On December 28, 1920, The New York Central Railroad Company filed its application with the Interstate Commerce Commission for authority and

for a certificate of public convenience evidencing the Commission's approval in respect of the following, viz (Tr. 33):

> (a) The purchase by The New York Central Railroad Company of all of the capital stock of the Chicago River & Indiana Railroad Company.
>
> (b) The leasing by The Chicago Junction Railway Company for a term of 99 years and thereafter at the election of the lessee in perpetuity of all its properties (owned and leased) to the Chicago River & Indiana Railroad Company.
>
> (c) The granting to The New York Central Railroad Company of an option to purchase all of the capital stock of The Chicago Junction Railway Company or all of the properties to be leased by it to the Chicago River & Indiana Railroad Company; all pursuant to the provisions of paragraphs (18) to (20), inclusive, of Section 1 and of paragraph (2) of Section 5 of the Interstate Commerce Act.

On May 16, 1922, after a full hearing and a report containing its findings of fact and its conclusions thereon (Tr. 15), the Commission approved and authorized (a) and (b). Authority to purchase the capital stock or the physical properties of the Chicago Junction Railway Company was denied. The right to prescribe the terms, methods, and character of security, if any, which the New York Central may employ to effectuate the purchase of the capital stock of the Chicago River & Indiana was reserved to the Commission. (Tr. 33.)

The New York Central was the applicant before the Commission. The Chicago Junction Railway and Chicago River and Indiana Railroad appeared by their counsel. (Tr. 15.) Three separate sets of interveners also appeared by their respective counsel. Belt Railway Company and Chicago Railway Terminal Commission also appeared by their respective counsel but it does not appear in what capacity, whether as interveners or otherwise. (Tr. 15.)

The record was voluminous. (Tr. 16.)

The contentions of the intervening carriers are set forth in full in the report. (Tr. 16, 17, 19.) So also with respect to two separate groups of shippers. (Tr. 19, 22.) The Chicago Railway Terminal Commission feared "that the project may prove deterrent to the adoption of the City's plan, not yet formulated, for the unification and coordination of all Chicago Terminals." (Tr. 19.)

On May 29, 1922, the intervening carriers (appellants here) filed a petition for modification of the report and order. (Tr. 34.)

On June 12, 1922, the Commission denied that petition. (Tr. 6.)

No affirmative order of any kind whatsoever was ever entered against the appellants here (interveners before the Commission). All they allege is that they were interveners before the Commission to oppose any such order as that which was entered and that the latter denied their petition for rehearing.

No affirmative order of any kind was ever entered against the New York Central, the applicant before the Commission and an appellee here.

The order of May 16, 1922, is permissive and that only. Under these circumstances the United States filed a motion to dismiss for want of jurisdiction on two grounds. (Tr. 40.)

The District Court (Circuit Judge Baker and District Judges Carpenter and Wilkerson) dismissed the bill without opinion. (Tr. 143.)

ARGUMENT.

I.

THE SUIT IS NOT A SUIT AGAINST THE UNITED STATES PURSUANT TO THE COMMERCE COURT ACT OF JUNE 18, 1910, CH. 309, 36 STAT. 539, AND THE URGENT DEFICIENCIES ACT OF OCTOBER 22, 1913, CH. 32, 38 STAT. 219-221, TO ENJOIN, SET ASIDE, ANNUL OR SUSPEND AN ORDER OF THE INTERSTATE COMMERCE COMMISSION; BUT BY NAMING THE UNITED STATES AS A DEFENDANT THE PLAINTIFFS UNDERTAKE TO ESTABLISH JURISDICTION BEFORE A SPECIAL COURT OF THREE JUDGES AND THEN TO CONDUCT A CASE ON THE MERITS OF THE CONTROVERSY BETWEEN APPELLANTS AND THE APPELLEES OTHER THAN THE UNITED STATES.

Paragraph III of the bill alleges (Tr. 3)—

> This is a suit brought pursuant to the provisions of C. 32 of the Urgent Deficiency Appropriations Act, approved October 22, 1913 (38 Stat. L. 219, 220), to enjoin, set aside, annul, suspend and restrain the enforcement, operation, and execution of an order of the Interstate Commerce Commission entered May 16, 1922, in Finance Docket 1165,

and—

> to enjoin and restrain the Central, the River Road, the Junction, the Chicago Junction Railways and Union Stock Yards Company and Richard Fitzgerald from the sale and purchase of certain stock and the execution of a certain lease authorized and approved by the Interstate Commerce Commission in said order, as will more fully appear below, said order having been made and entered on the petition of the said Central, and to set aside and hold for naught any and all acts, transactions, matters and things performed and done by any of said defendants under or in alleged conformity with said order of May 16, 1922.

Readily observable is it that under the Urgent Deficiencies Act the bill seeks "to enjoin, set aside, annul, suspend and restrain" a permissive order which has already been executed.

Convinced that such a suit even if successful would avail nothing, the plaintiffs then, in a suit against the defendants other than the United States, prayed for an order adjudging null and void the whole transaction and for an injunction order against the continuance of the same that the *status quo ante* may be completely restored.

In order to accomplish all of these things, a third ground of relief is asked, *i. e.*, numerous interrogatories are propounded to be answered by appellees other than the United States.

The bill of complaint thus confounds an attempted suit between seven railroad companies as plaintiffs

and four railroad companies as defendants under the general equity jurisdiction, with an attempted suit between the same seven railroad companies as plaintiffs and the United States of America as defendant under the Urgent Deficiencies Act. Opposing counsel undertake to justify this course with the argument that after the court had brought all *interested parties* before it the court may then enter an order "which can do entire justice to all parties."[1] (App. Br., 39.)

Obviously if the United States had been named the defendant as provided by statute (see *The New England Divisions Case*, 261 U. S. 184) instead of the carriers, the plaintiffs could not maintain the suit. By naming the United States as one of the defendants, plaintiffs undertook, *first*, to invoke the jurisdiction of the Special Court (see Urgent Deficiencies Act, 38 Stat. 219); and, *second*, then to try issues between plaintiffs and The New York Central, which they make the principal defendant and against whom their main case is made.

Plaintiffs ought not to be allowed to confound an attempted suit against the United States with an attempted suit against the carriers. They should be compelled to declare themselves one way or the other.

The United States has never consented to be sued in such a manner. (*Louisiana* v. *McAdoo*, 234 U. S. 627, 628; *Minnesota* v. *Hitchcock*, 185 U. S.

[1] Wabash Railway Company, on July 16, 1923, withdrew (Tr. 146).

373; *Oregon* v. *Hitchcock*, 202 U. S. 60; *Illinois Central* v. *Public Utilities*, 245 U. S. 493.

II.

THE ORDER ENTERED MAY 16, 1922, BY THE INTERSTATE COMMERCE COMMISSION IS A MERE NEGATIVE ORDER IN SO FAR AS IT RELATES TO THE APPELLANTS AND A MERE PERMISSIVE ORDER IN SO FAR AS IT RELATES TO THE APPELLEES OTHER THAN THE UNITED STATES, AGAINST WHICH ORDER A SUIT TO ENJOIN, SET ASIDE, ANNUL, OR SUSPEND WILL NOT LIE UNDER COMMERCE COURT ACT OF JUNE 18, 1910, CH. 309, 36 STAT. 539, AND THE URGENT DEFICIENCIES ACT OF OCTOBER 22, 1913, CH. 32, 38 STAT. 219-221.

The Transportation Act of 1920, Section 402, provides (Ch. 91, 41 Stat. 477, 478):

> (18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission

a certificate that the present or future public convenience and necessity permit of such abandonment.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier

by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this Act, and to extend its line or lines: *Provided*, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public

> convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this Act which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

The Transportation Act of 1920, Section 407, provides (Ch. 91, 41 Stat. 481):

> (2) Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises.

The permissive order of the Commission directed the New York Central to do nothing affirmatively.

On the latter's application, the Commission authorized and approved a purchase of stock and a form of lease. It *ordered* nothing. It issued an approval. For failure to execute the terms of the approval there is no penalty except if executed it must be done as the Commission prescribes. If the New York Central had failed to carry out the terms of the approval after it was issued, could the plaintiffs here, or any other authority, have compelled it to do so?

This Court has held that—

> It will thus be observed, as said by counsel for the Commission, "the power of a court 'to stay the enforcement of an illegal order' is, in a sense, reciprocal to its power to enforce compliance with an order of the Commission, 'if lawful.' * * * And just as the District Court would have been powerless, in the instant case, to compel the appellee to attend the hearing with respect to which the notice had been given, so also was it without lawful authority to annul that notice or to enjoin the Commission from proceeding in the premises." (*United States* v. *Illinois Central*, 244 U. S. 82, 89.)

The case, then, comes to this: Appellants who were unsuccessful interveners before the Commission, and as to whom the order is clearly negative, after waiting almost one full year to make up their minds, sue to enjoin the execution of an already executed permission of the Commission, which authorized and approved the purchase of stock and lease of one rail-

road company by another under the Transportation Act.

Is such a case justiciable under the Urgent Deficiencies Act and the Commerce Court Act?

The Commerce Court Act provides (ch. 309, 36 Stat. 542):

> SEC. 3. That suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the Commerce Court against the United States.

The Urgent Deficiencies Act, which abolished the Commerce Court, provides (ch. 32, 38 Stat. 219):

> The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. * * *
>
> The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by this Act shall be the

same as that heretofore prevailing in the Commerce Court.

In *Illinois Central Railroad* v. *Public Utilities Commission*, 245 U. S. 493, 505, this Court said:

> * * * the United States is made by statute a necessary party to a suit to set aside an order of the Commission, and this means that it is to stand in judgment as representing the public.

The bill of complaint appears to have been modeled after the bills in *Procter & Gamble Co.* v. *United States*, 225 U. S. 282; *Hooker* v. *Knapp et al.*, and *Eagle White Lead Co.* v. *Interstate Commerce Commission*, 225 U. S. 302. In those cases the railroad companies were also named as defendants in order that injunctions might be prayed against them as no case could be made against the United States.

In the *Procter & Gamble case* Mr. Chief Justice White, in stating the form of the action, said (225 U. S. 287):

> In February, 1911, the Procter & Gamble Company filed a petition in the Commerce Court of the United States making defendants the United States, the Interstate Commerce Commission, and the railroads who had been complained of in the proceeding before the Commission. The petition recited the facts stated above as to the character of the business of the petitioner, the ownership of tank cars, etc., the establishment of the rules for demurrage, their repugnancy to the act to regulate commerce, the injury which had re-

> sulted from being compelled to pay the charges for demurrage in accordance with the rules, the application made to the Commission, and the refusal of that body to award relief. The conception upon which the petition was based is shown in the excerpt in the margin, wherein it was also charged that the order of the Commission dismissing the complaint as above set forth "is null and void and beyond the power of said Interstate Commerce Commission, in that it sustains the validity of * * * said demurrage rules."

In that case, as in this case, the United States moved to dismiss for want of jurisdiction.[2] (225 U. S. 289.)

The Commerce Court took jurisdiction of the controversy and then held that the Commission had rightly decided and entered an order dismissing the petition on the merits.

On the appeal of Procter & Gamble, this Court reversed the judgment of the Commerce Court and sustained the motion of the United States to dismiss for want of jurisdiction on the ground that the order was negative. This Court referred to the decision of the Commerce Court which had held that the order of dismissal of the Commission was in effect the equivalent of an order of the Commission granting affirmative relief, thus (225 U. S. 290):

[2] In their brief opposing counsel say (p. 41): "The *carriers* challenged the jurisdiction of the court on the ground that the order of the Commission was negative." The record and briefs in that case disclose that neither the carriers nor the Commission challenged the jurisdiction. The United States alone raised the question.

In disposing of the case, the court considered it in a twofold aspect—first, as to its jurisdiction; and, second, as to the merits of the case. On the first subject it held, *a*, that it had jurisdiction of the cause, and that the refusal of the Interstate Commerce Commission to afford relief to the Procter & Gamble Company was, for the purposes of jurisdiction of the court, the exact equivalent of an order of the Commission granting affirmative relief, and, *b*, as a corollary of this power it was further decided that there was jurisdiction to award pecuniary relief for demurrage if any was illegally exacted.

In *Lehigh Valley Railroad Co.* v. *United States*, 243 U. S. 412, 414, the Act of August 24, 1912 (c. 390, Sec. 11, 37 Stat. 560, 566), known as the Panama Canal Act, prohibited, after July 1, 1914, any ownership by a railroad in any common carrier by water when the railroad might compete for traffic with the water carrier; the Commission was authorized to determine questions of fact as to such competition. On application of carriers the Commission was authorized to extend the time for the relinquishment of the ownership if the extension would not exclude or reduce competition on the water route. Lehigh Valley filed a petition praying for a hearing as to whether the services of a steamship line owned by it would be in violation of the act and for an extension of time. The petition was dismissed and the statute became absolute against the company (33 I. C. C. 699, 706, 716; 37 I. C. C. 77).

The bill was filed to prevent the enforcement of the order of the Commission, and the prayer for relief was as follows:

> Wherefore your petitioner prays that * * * the respondent (United States) and the Interstate Commerce Commission and its members, their agents, servants, and representatives and each of them be perpetually enjoined and restrained by a decree and injunction of this court from enforcing the said order of the Interstate Commerce Commission of May 7, 1915, and from taking any steps or instituting any proceedings for the enforcement thereof, and your petitioner also prays that a provisional or preliminary injunction be issued out of and under the seal of this Honorable Court, enjoining and restraining the respondent and the Interstate Commerce Commission and its members, their agents, servants, and representatives and each of them, to the same purpose, tenor, and effect hereinbefore prayed in regard to said perpetual injunction, and for such other and further relief, general and special, in the premises as justice and equity may require.

The District Court denied the injunction and dismissed the bill (234 Fed. Rep. 682). In holding that the District Court was without jurisdiction over the report and order of the Commission, this Court said (234 U. S. 414):

> Three judges sitting in the District Court denied the injunction asked and dismissed the bill (234 Fed. Rep. 682). Although they

> proceeded to discuss the merits of the case they intimated at the outset a strong doubt whether in any event an injunction could be granted. If this doubt was well founded there is nothing more to be said, *since the ground of jurisdiction is gone.* * * *
>
> The order of the Commission was negative in substance as well as in form. *Procter & Gamble Co.* v. *United States*, 225 U. S. 282, 292, 293.

It is respectfully submitted that the order in the instant case is negative as to these appellants and not reviewable by the court.

In *Intermountain Rate Cases*, 234 U. S. 476, the order of the Commission was alleged to be of momentous consequence. That order carved the United States into five zones from which commodity rates were fixed on percentage bases to Pacific Coast terminals; that is to say, the rates from Zone No. 1 to intermediate points than to Pacific Coast terminals shall remain the same; that commodity rates from all points in zones numbered 2, 3, and 4 to points intermediate to Pacific Coast terminals that are higher to intermediate points than to Pacific Coast terminals shall not exceed the rates on the same commodities from the same points of origin to the Pacific Coast terminals by more than 7 per cent from points in Zone No. 2; 15 per cent from points in Zone No. 3; and 25 per cent from points in Zone No. 4. All rates so fixed by the order were subject to complaint, investigation, and correction when they conflicted with any other provision of the act.

The order was entered under Section 4 of the Act to Regulate Commerce, as amended, which established the "hard and fast" long and short-haul clause, relief from which could be obtained only by the application to the Commission on a proper showing. The order directed the carriers to conform to its terms. It was affirmative in all respects and this Court so held.

In *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557, neither the words "negative order" nor words of any similar import are mentioned in the opinion. It does not appear ever to have been suggested by counsel or intimated by the court that the order in that case had any of the characteristics of a negative order.

In *McLean Lumber Co.* v. *United States*, 237 Fed. Rep. 460, the ruling of the District Court is not in line with the decisions of the Supreme Court in the *Procter & Gamble* and *Lehigh Valley* cases. Passing the question whether that case has any bearing whatever on the instant case, it is enough to say that the bill was dismissed on the merits and as the plaintiff failed to appeal, there was no opportunity to review the action of the District Court in taking jurisdiction.

Is it an enforcible order of the Commission subject to review by the judicial power under the Urgent Deficiencies Act? If appellants' contention is sound, the Chicago Railway Terminal Commission, which appears to represent a department or an agency of that City, might maintain a similar bill, for its "fears"

are "that the project may prove deterrent to the adoption of the City's plan, not yet formulated, for the unification and coordination of all Chicago terminals, the establishment of universal freight stations and other measures which may hereafter be adopted to relieve congestion in the downtown shipping district, and would prefer to have the Junction and River Road properties remain neutral pending the outcome of its investigations and the adoption by legislation or otherwise of a comprehensive policy." (Tr. 19, 21.) If such a bill were filed by that Commission, it would meet at once with the objection that the grounds upon which relief was asked were purely speculative. But they are no more speculative than the estimated millions of losses for alleged failure to gain competitive traffic because one railroad company has purchased the stock of another and leased its railroad under a permit of the Interstate Commerce Commission authorized by the Transportation Act. About 90 per cent of the 400 shippers served by the Junction and River Road urged the approval of the proposed plan, although 30 of those indorsements were subsequently withdrawn. (Tr. 16.)

Chicago is the greatest railroad terminal in the world. It is served by approximately 35 trunk lines, any or all of which have the identical speculative interest as the appellants. This Court has held that the right to compete for traffic is not a constitutional right.

Generally, the appellees allege (Tr. 10, 53, 54) "that the loss in net earnings to plaintiffs which will result from the acquisition of control approved and authorized by the Commission in its order will exceed $10,000,000 per annum." The whole foundation underlying the bill appears to be that the arrangement strengthens the New York Central and weakens the Baltimore & Ohio, the Pennsylvania Company, and the other appellants in their efforts to gain "competitive traffic." (Tr. 53, 54.) This Court has held that the right of a carrier to compete for traffic is not a constitutional right and that "the final contention, which is that the Commission's order in effect deprives the New Orleans, Texas & Mexico of its property without due process of law, *by denying to it the right to contract and compete for traffic* originating on the line of the Louisiana & Pacific, *is transparently unsound.*" (*O'Keefe, Receiver*, v. *United States*, 240 U. S. 294, 304.)

As appellants have shown no actual loss of specific traffic or earnings and as the terminals are still open to all, the mere objection to the purchase of the capital stock and the leasing by one railroad of another is not a subject to which the equity jurisdiction of the court attaches. If it is, not only railroads serving Chicago but any part of the country may maintain a similar suit. Under the Transportation Act we are bound to consider the transportation system as a whole. That act, all parts thereof, and all of the carriers subject thereto must now be kept

in full view at all times to the end that all of the incidents to the development of an adequate transportation may move forward at once and together. Mere apprehension of interference with business is not a subject of the equity jurisdiction. *Edward Hines Yellow Pine Trustees* v. *United States*, No. 91, this Term.

CONCLUSION.

The motion of the United States to dismiss for want of jurisdiction should be sustained and the decree should be affirmed.

HARRY M. DAUGHERTY,
Attorney General.
JAMES M. BECK,
Solicitor General.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

○

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No. 489.

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL., APPELLANTS,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL., APPELLEES.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

P. J. FARRELL,
For Interstate Commerce Commission,
Appellee.

JANUARY, 1924.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1924

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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

THE BALTIMORE & OHIO RAILROAD COMPANY, et al., appellants,
v.
UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, et al., appellees. | No. 489.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

STATEMENT.

This is an appeal from a decree of the District Court of the United States for the Northern District of Illinois, Eastern Division. The appellants here were the plaintiffs in the lower court. The suit was instituted for the purpose, among other things, of obtaining a decree of the court annulling and setting aside an order of the Interstate Commerce Commission, which is in words and figures as follows, namely:

ORDER.

> At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 16th day of May, A. D. 1922.

Finance Docket No. 1165.

In re application of the New York Central Railroad Company for authority and for a certificate of public convenience evidencing the Commission's approval in respect of the following:

(*a*) The purchase by the New York Central Railroad Company of all of the capital stock of the Chicago River & Indiana Railroad Company.

(*b*) The leasing by the Chicago Junction Railway Company for a term of 99 years and thereafter at the election of the lessee in perpetuity of all its properties (owned and leased) to the Chicago River & Indiana Railroad Company.

(*c*) The granting to the New York Central Railroad Company of an option to purchase all of the capital stock of the Chicago Junction Railway Company or all of the properties to be leased by it to the Chicago River & Indiana Railroad Company; all pursuant to the provisions of paragraphs (18) to (20), inclusive, of section 1 and of paragraph (2) of section 5 of the interstate commerce act.

A hearing and investigation of the matters and things involved in this proceeding having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of facts and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the acquisition by the New York Central Railroad Company of the control of the Chicago River & Indiana Railroad Company by the purchase of its capital

stock at a price not exceeding the sum of $750,000 be, and the same is hereby, approved and authorized.

It is further ordered, That the acquisition by the Chicago River & Indiana Railroad Company of the control of the property of the Chicago Junction Railway Company, by lease, as set forth in said report, be, and the same is hereby, approved and authorized.

Provided, That the right to prescribe the term [terms], methods, and character of securities, if any, which the New York Central Railroad Company may employ to effectuate the purchase of the capital stock of the Chicago River & Indiana Railroad Company be, and it is hereby, reserved to the Interstate Commerce Commission: *And provided further*, That the purchase and sale of said stock and the making of said lease, as herein authorized, shall in all future proceedings, judicial as well as administrative, to which the carriers above named, or any of them, may be parties, be deemed and taken as conclusive evidence of their acceptance of and agreement to abide by the conditions enumerated in said report and numbered from 1 to 17, inclusive.

It is further ordered, That said application, so far as it seeks authority to purchase the capital stock or the physical property of the Chicago Junction Railway Company, be, and the same is hereby, denied without prejudice to future proceedings.

By the Commission:

[SEAL.] GEORGE B. MCGINTY,
Secretary.

(Rec. 33–34.)

The conditions mentioned in the order are:

1. The Central will be required to maintain a separate corporate identity and organization for the combined properties of the Junction and River Road so that the two shall constitute a separate operating entity with a responsible management located in Chicago in order to preserve for the shipper the present direct access to the railroad officials.

2. The present neutrality of handling traffic in and outbound by the Junction and River Road organization shall be continued so as to permit equal opportunity for service to and from all trunk lines reaching Junction rails, without discrimination as to routing or movement of traffic which is competitive with the traffic of the Central, and without discrimination against such competitive traffic in the arrangement of schedules.

3. The present traffic and operating relationships existing between the Junction and River Road and all carriers operating in Chicago shall be continued, in so far as such matters are within the control of the Central.

4. For the purpose of assessment of switching charges the Junction and River Road shall continue to be treated as a single line to the same extent as at present, so that the carrying out of this plan will not in and of itself result in increasing the charge to any shipper for the service.

5. Subject to subsisting car service regulations, cars made empty on the rails of the Junction and River Road shall be available for outbound loading in the same manner and

to the same extent as at present, irrespective of routing.

6. Whenever additional cars are required for outbound loading because of inadequacy of available car supply on the Junction and River Road rails at any given time, for any cause, orders for such additional cars shall be accepted from the shipper by the local Junction organization and by it promptly transmitted to the designated trunk line without discrimination, and all cars ordered by and delivered to the Junction shall be promptly moved to the shippers by the Junction without discrimination on account of proposed routing.

7. The Junction shall accept, handle, and deliver all cars in and out bound, loaded and empty, without discrimination in promptness or frequency of service as between cars destined to or received from competing carriers and irrespective of destination or route of movement.

8. The National Code of Demurrage Rules, as in effect from time to time, including the average agreement, shall be applied by the Junction and River Road to each industry served by either of them on all in and out bound cars irrespective of what carrier or carriers may be interested in the line haul.

9. Shippers served by the Junction and River Road shall be entitled to the same basis of switching charges as prevails in the Chicago switching district generally, and no attempt shall be made to establish any different basis of local or connecting line switching charges than that which prevails in the Chicago

switching district generally for the same or similar service under substantially similar conditions.

10. No change shall be sought in the present method of basing rates to and from the Chicago switching district as a single point upon which rates are now based without regard to the character of the movement in and out of such district.

11. Present trap-car arrangements for the transfer of l. c. l. freight at the Junction Union Station, at connecting-line freight stations, or at connecting points reached by the Junction and River Road, shall be continued, but this condition shall not apply to routine changes in management and operation of trap-car service.

12. Continuance of present operating arrangement on the Junction properties shall include the maintenance of existing shipping and billing arrangements at the Junction Union Freight Station, in so far as such arrangements are within the control of the Junction.

13. The Junction shall, if ordered by us, establish station facilities for the receipt of inbound l. c. l. freight at a point convenient and accessible to shippers wishing to make use of the same, to which freight may be delivered by all trunk-line carriers, without discrimination, and there distributed through the medium of the Junction's operating force.

14. Neither the approval of the purchase by the Central of the stock of the River Road for the sum specified, nor of the leasing to the latter of the properties of the Junction, shall be taken as establishing or tending to establish

the fair value of the respective properties in any other proceeding, nor shall anything herein contained be construed as a finding that the annual rental to be paid by the River Road for the lease of the Junction properties is just and reasonable.

15. The carrying out of the plan as authorized herein shall be taken to be without prejudice to the adoption of any plan or plans in the future by the City of Chicago, by us or by any other public agency, for unified or coordinated terminals, and neither the Central, the River Road nor the Junction shall urge the authority herein given or the situation resulting therefrom as a ground for opposition to such plan or plans of said city, our plans or those of any other public agency.

16. Nothing contained in this authorization shall be taken as permitting the River Road and Junction properties to be considered as a part of a single system with that of the Central for any of the purposes of section 15a or section 20a of the act.

17. Any party or any person having an interest in the subject matter may at any future time make application for such modification of the above conditions, or any of them, as may be required in the public interest, and jurisdiction is retained to reopen the proceeding on our own motion for the same purpose. (Rec. 22–24.)

The order of May 16, 1922, modified by conditions as aforesaid, is based upon a report of the same date, and the report and order were made and entered in a

proceeding then pending before the Commission, wherein the New York Central Railroad Company, the Chicago River & Indiana Railroad Company, the Chicago Junction Railway Company, and the appellants herein were parties and appeared and were represented by their respective counsel. (Rec. 15.)

In said report, wherein the New York Central Railroad Company was called the "Central," the Chicago River & Indiana Railroad Company was called the "River Road," and the Chicago Junction Railway Company was called the "Junction," the Commission, among other things, said:

> Subject to the observance of the above conditions, we find that the acquisition by the Central of the capital stock of the River Road and the leasing to the River Road of the properties (owned and leased) of the Junction will be in the public interest. (Rec. 24–25.)

The report and order were made by the Commission under authority conferred upon it by the interstate commerce act, paragraph (2) of section 5 of which reads as follows:

> Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this act, that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving

> the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises.

Reasons advanced by the appellants in support of their contention that the order is invalid are set forth particularly in Paragraph X, pages 10 to 15, inclusive, of the bill of complaint, and may be summarized as follows:

1. In making the order the Commission did not comply with the requirements of paragraphs (18) to (20), inclusive, of section 1 of the interstate commerce act.

2. The Commission's conclusion that the doing of the things authorized by the order to be done will be in the public interest is not supported by the record upon which the order is based.

3. The doing of the things authorized by the order to be done will constitute a consolidation of the carriers involved into a single system for ownership and operation.

4. The order was made in a proceeding before the Commission in which the New York Central Railroad Company was the only applicant.

5. In stating its conclusion that the doing of the things authorized by the order to be done will be in

the public interest, the Commission did not comply with the requirements of paragraph (2) of section 5 of said act.

6. The time within which it is to take effect is not stated in the order.

7. The lease, the execution of which is authorized by the order, has not been submitted to or approved by the Commission.

The decree of the lower court, filed June 28, 1923, is in words and figures as follows, namely:

> This day this cause coming on to be heard before a Court composed of a Circuit Judge, and two District Judges, pursuant to the statute in such case made and provided, upon the bill of complaint of said plaintiffs, and upon the motion to dismiss of the United States, The New York Central Railroad Company, The Chicago River and Indiana Railroad Company, The Chicago Junction Railways and Union Stock Yards Company, The Chicago Junction Railway Company and Richard Fitzgerald, and upon the answer of the Interstate Commerce Commission, and upon the motion of the plaintiffs for an interlocutory injunction, all parties being before the Court in person as well as by counsel, the Court having heard the arguments of counsel and being fully advised in the premises,
>
> Doth order, adjudge, and decree that the motion of the plaintiffs for an interlocutory injunction be and the same is hereby denied;
>
> And thereupon the plaintiffs moved the court for leave to amend their said bill of com-

plaint instanter, which said motion was thereupon granted, and said amendment having been made instanter, thereupon on motion of the defendants, the answer of the Interstate Commerce Commission and the several motions of said other defendants to dismiss the bill of complaint were ordered to stand to the bill of complaint as amended.

Thereupon said cause came on again to be heard before the Court constituted as aforesaid, upon the bill of complaint as amended and upon the motion of the plaintiffs for an interlocutory injunction, and upon said motions of said several defendants to dismiss the said bill of complaint as amended, the Court having heard the arguments of counsel and being fully advised in the premises.

Doth order, adjudge, and decree and it is hereby ordered, adjudged, and decreed that the motion of the plaintiffs for an interlocutory injunction be and the same is hereby denied and that the several motions of said several defendants to dismiss said bill of complaint as amended be and the same are hereby granted, and

It is hereby ordered, adjudged, and decreed that the said bill of complaint as amended be and the same is hereby dismissed at plaintiffs' costs. (Rec. 143–144.)

In this brief we will endeavor to show that the order of the Commission complained of by appellants is valid.

ARGUMENT.

I.

THE VALIDITY OF THE ORDER OF MAY 16, 1922, IS NOT DEPENDENT IN ANY WAY UPON COMPLIANCE WITH THE REQUIREMENTS OF PARAGRAPHS (18) TO (20), INCLUSIVE, OF SECTION 1 OF THE INTERSTATE COMMERCE ACT.

The text of the paragraphs mentioned is set forth in Paragraph V on pages 6 to 8, inclusive, of the bill of complaint, and prohibits any carrier subject to said act from extending its line of railroad, or constructing a new line of railroad, or acquiring or operating any line of railroad or extension thereof, or engaging in transportation under said act over or by means of such additional or extended line of railroad, or abandoning all or any portion of a line of railroad or the operation thereof, "unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require" such extension, etc., or "permit of such abandonment." In making the order of May 16, however, it will be observed that the Commission based its action upon the authority conferred upon it by paragraph (2) of section 5 of said act, and it is therefore apparent that the order is not affected in any way by the fact that the Commission did not comply with the requirements of the paragraphs of section 1 of the act above mentioned.

II.

THE COMMISSION'S CONCLUSION THAT THE DOING OF THE THINGS AUTHORIZED BY THE ORDER TO BE DONE WILL BE IN THE PUBLIC INTEREST IS SUPPORTED BY THE RECORD UPON WHICH THE ORDER IS BASED.

Subdivisions 6 and 7 of Paragraph X of the bill of complaint contain allegations as follows:

> The record made before the Commission upon which the said order is based contains no evidence that the acquisition by the Central of control of the River Road by the purchase of the capital stock of the River Road will be in the public interest; but, on the contrary, the said record contains evidence which clearly shows that the said acquisition of control is and will be directly contrary to public interest and to a sound public policy.
>
> The record made before the Commission upon which the said order is based contains no evidence that the acquisition by the River Road of the control of the properties of the Junction under a lease will be in the public interest; but, on the contrary, the said record contains evidence which clearly shows that the said acquisition is and will be directly contrary to the public interest and to a sound public policy. (Rec. 7.)

Since appellants' allegations concerning lack of evidence in the record before the Commission are denied in the Commission's answer, the court, in the absence of the submission of evidence by appellants to the contrary, which can result only from the submission in evidence before the court of a certified

copy of the record made in the proceeding before the Commission, will presume that the evidence contained in that record is sufficient to support the Commission's conclusion that the doing of the things authorized by the order to be done will be in the public interest. In this connection, however, we call attention to the report of the Commission, which is referred to in and made a part of the order, and in which the Commission, among other things, said:

> The record, which is voluminous, established the following facts: The territory served by the Junction and River Road lines is entirely within the so-called Chicago switching district, and is treated in the application as dividing naturally into five groups, of which two are of primary importance for the purposes of this proceeding, namely, the Central Manufacturing District and the Stock Yards group. The other three comprise the sections north from the stockyards to Fifteenth Street, east to Lake Michigan and southwest to Central Park Avenue, respectively, including what is known as the Kenwood Manufacturing District. The Central now controls by stock ownership the Indiana Harbor Belt Railroad, hereinafter termed the Harbor Belt, which is located for the most part outside of Chicago and connects the Central main line with the River Road at Elsdon and with that road and the Junction at Forty-ninth and Oakley Streets, and again with the latter line at Forty-ninth and Morgan Streets. The other eastern trunk lines, intervening in this proceeding and competing

with the Central for line-haul traffic, connect with the terminal facilities afforded by the Junction and River Road either directly from their own rails or by means of other belt lines, namely, the Belt Railway of Chicago, controlled by a group of carriers, the Chicago & Western Indiana Railroad, likewise so controlled, and the Baltimore & Ohio Chicago Terminal Railway, owned by the Baltimore & Ohio Railroad. The Junction and River Road properties, the Elgin, Joliet & Eastern Railroad, and the Illinois & Northern Railroad comprise the only independently owned terminals in the Chicago switching district. The Junction and River Road handle traffic to and from all of the 23 trunk lines entering Chicago.

The nucleus of the present Junction system was constructed in 1865 by the stockyards interests, which operated the property up to 1887, all of the trunk lines entering the yards for both inbound and outbound traffic. From 1887 to 1893 the lines were operated by a transfer association controlled by the carriers. The stockyards company resumed operation from 1893 to 1897, in which year the properties were leased to the Chicago & Indiana State Line Company for 50 years, and in 1898 the lines were merged with the Chicago, Hammond & Western Company under the corporate name of Chicago Junction Railway Company. In 1907 the Junction sold the Chicago, Hammond & Western properties to the Harbor Belt.

Besides serving the stockyards and Packingtown, the Junction performs terminal service for all the carriers in reaching the Central Manufacturing District, which as an institution has been in existence for about 15 years and has 180 industries, producing a tonnage of over 100,000 carloads per year, and 100,000 tons per year of l. c. l. freight. This district is in the geographical center of the city and is capable of accommodating not less than 500 additional industries and of producing more than twice the present annual tonnage of freight.

The movement of livestock in and out of the Junction yards is essentially different from the method of handling the dead freight, in that each carrier moves its trains to the unloading chutes with its own power and goes into the pens for outbound stock destined for its own line. All parties concede that that is the only practical method of handling that traffic. In the case of dead carload freight inbound the line-haul carrier places its loads in the Junction yards at Ashland Avenue, where they are picked up by Junction engines and crews and moved to the point of unloading. Outbound carloads are picked up by the Junction crews at team and industry tracks and moved to its 49th Street classification yards, then taken out and classified for destination by the line-haul carriers, each of which has in such yards an appropriate number of tracks designated to receive its traffic. For outbound l. c. l. shipments the Junction maintains a union freight station at 15th Street and Western Avenue, where any number of

packages can be drayed by a shipper and billed to destination on as many different trunk lines to any point in the United States or Canada. Such shipments are collected by the Junction in a car or cars for each carrier and delivered to the proper track in the classification yards as in the case of carload freight. A trap car service is also maintained. Dressed meats from Packingtown are handled through the yards in like manner, each packer looking after the cleaning and icing of its own empty cars at a convenient point on the Junction rails. The Junction performs no function as to routing of a shipment, either carload or l. c. l., and if through inadvertence a shipment is offered without routing it is held for instructions. Each carrier makes regular scheduled trips to the classification yards to leave and pick up its own line-haul freight, the number of trips per day depending upon the volume of business handled by the individual carrier. Thus the Junction organization performs purely a switching service as to those movements, the charges therefor constituting a part of the through rates published by the line-haul carriers. The Junction lines also serve an important purpose in providing facilities on a trackage basis for the interchange of traffic passing through the Chicago gateway. However, with the growth of the industrial switching business, the increased density of traffic has produced such a congestion as to make it desirable to perform certain services at points farther out on the belt lines. Earnings of the Junction in the

> past have not been such as to permit of the expansion of its facilities to meet the growing requirements of the district served, and this is true as to interchange as well as switching and team track facilities. (Rec. 16–18.)

We do not understand that appellants in their bill of complaint have denied any of the statements of fact included in the paragraphs of the Commission's report above quoted, and upon which is based the Commission's conclusion that the doing of the things authorized by the order to be done will be in the public interest, and we feel certain an attempt to do so would not be successful, because the statements are nearly all descriptive in character; that is to say, they describe the terminal facilities involved and the territory in Chicago in which they are located, the carriers which on May 16, 1922, were engaged in operating the facilities, the transportation services the carriers were then performing, and the manner in which the carriers were at that time discharging their duties as common carriers in the premises.

In stating the reasons which prompted it to reach the conclusion it reported, the Commission, among other things, further said:

> There are grave objections to an unconditional approval of the plan under consideration. Much testimony was adduced at the hearings, and divergent opinions were expressed, as to the relative merits of cooperative, singly controlled and independently controlled terminals. That discussion need not be reproduced here. The policies and plans of the city with respect

to the general terminal situation have not yet fully developed, and it is obviously impossible for anyone to determine at this time the ultimate goal which ought to be attained. It is believed, however, that pending final determination of future policies, the greatest good can be attained by the continuance, for the time being, of the competitive terminal situation. This can be best accomplished by bringing the present neutral Junction properties into closer relation with a trunk line like the Central. The Central's terminal facilities are relatively inadequate as compared with the competitor eastern trunk lines, but the Central controls extensive facilities for classification and interchange which are complementary to the Junction properties. The stronger competition and the connection between the Junction properties and the Harbor Belt facilities which would thus be brought about, would not only insure to the shippers of the Junction the necessary expansion and elasticity of facilities, together with the assistance of an interested trunk line in times of car shortage, and other emergencies, but would also remove congestion from the closely hemmed-in district served by the Junction and thus open facilities for expedition in the handling of traffic in and out, and also for handling traffic from one part of the city to another. * * * (Rec. 21.)

It will be observed that the deductions of the Commission are based, to some extent, at least, upon matters of which both the Commission and the court may properly take judicial notice, and for this

reason, in addition to the reason first above set forth, it is apparent, we submit, that appellants' allegations concerning lack of evidence have no foundation upon which to rest.

III.

THE DOING OF THE THINGS AUTHORIZED BY THE ORDER TO BE DONE WILL NOT CONSTITUTE A CONSOLIDATION OF THE CARRIERS INVOLVED INTO A SINGLE SYSTEM FOR OWNERSHIP AND OPERATION.

In subdivision 8 of Paragraph X of the bill of complaint, appellants, among other things, allege that,

> * * * acquisition by the Central of the control of the River Road by the purchase of the capital stock of said River Road and acquisition by the River Road of control of the Junction by lease of its properties, as set forth in the application of the Central to the Commission and authorized by the Commission, will constitute a consolidation of the Central, the River Road and the Junction into a single system for ownership and operation, and, therefore, the Commission is without authority by order to approve and authorize such acquisition. (Rec. 7–8.)

In the absence of controlling statutory provisions, the general rule is that a consolidation takes place only where, after the consolidation, the consolidated corporations, whose properties, including rights and franchises, are consolidated, cease to exist, except for the doing of things which may be necessary to properly protect their creditors, and a new corporation is created to take over and operate the properties as their owner.

In *Lee* v. *Atlantic Coast Line R. Co.*, 150 Fed. 775, pertinent language used by Pritchard, Circuit Judge, was as follows:

> The results of a merger are entirely different from those of a consolidation. Ordinarily, when corporations of two or more States "consolidate," in the technical sense of the term, the old corporations are dissolved and a new corporation comes into being in each State. Note to *Morrison* v. *Snuff Company*, 89 Am. St. Rep. 655; 2 Elliott on Railroads, sec. 335. However, when two corporations unite by way of merger, the result is not the same as in case of consolidation. In the case of merger the one is absorbed by the other, and when we come to apply the true test as to whether, under a given statement of facts, there has been a merger, it becomes necessary to ascertain whether the existence of one of the corporations, as such, has been preserved, and the other has ceased to exist. In the case of *Atlantic & Gulf R. R. Co.* v. *Georgia*, 98 U. S. 359, 25 L. Ed. 185, the court, in discussing the question as to the difference between a merger and a consolidation, among other things, said:
>
> > "That generally the effect of consolidation as distinguished from a union by merger of one company into another, is to work a dissolution of the companies consolidating, and to create a new corporation out of the elements of the former, is asserted in many cases, and it seems to be a necessary result."

Also in the case of *Vicksburg, etc., Telephone Co.* v. *Citizens' Telephone Co.*, 79 Miss. 341, 30 South. 725, 89 Am. St. Rep. 656, it is said:

> "There seems to be a great confusion as to the difference between consolidation and merger and sale. Rightly understood, there never can be a consolidation of corporations, except where all the constituent companies cease to exist as separate corporations, and a new corporation, to wit, the consolidated corporation, comes into being. A merger, rightly understood, is not the equivalent of consolidation at all, but exists where one of the constituent companies remains in being, absorbing or merging in itself all the other constituent corporations." (Id. 787–788.)

In *Thompson on Corporations*, second edition, volume 5, it is said:

> Consolidation takes place where two or more existing corporations are consolidated into a single corporation, and the existence of the uniting corporations is terminated and the consolidated company succeeds in a general way to the rights and franchises and acquires the property and assumes the obligations and liabilities of all the constituent companies. In the ordinary legal phraseology the term "consolidation" is generally used to indicate both the act and the result of uniting two or more corporations into one. (Section 6035.)
>
> * * * * *
>
> "There seems to be a great confusion as to the differences between consolidation and

> merger and sale. Rightly understood, there never can be a consolidation of corporations, except where all the constituent companies cease to exist as separate corporations, and a new corporation, to wit, the consolidated corporation, comes into being." Generally the effect of consolidation in strict legal parlance is that the consolidating corporations are dissolved and cease to exist, except, perhaps, for certain purposes and a new and distinct corporation is created by the consolidation, with the combined rights, franchises, privileges, and property of all the consolidating corporations. (Section 6040.)

It will be observed that the Commission has not acted or *purported* to act under paragraphs (4) to (6) of section 5 of the act. The complete plan which these paragraphs call for has not been formulated or promulgated. In said paragraph (6) it is, among other things, provided that—

> It shall be lawful for two or more carriers by railroad, subject to this act, to consolidate their properties or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership, management, and operation, * * *.

In construing this language in *Control of Central Pacific by Southern Pacific*, 76 I. C. C. 508, the Commission said:

> The question has been raised as to whether an acquisition of control under the circumstances proposed amounts to a consolidation

> of the carriers concerned "into a single system for ownership and operation," as to which type of control we have no jurisdiction under paragraph (2) of section 5. We have given consideration to the question and find that an acquisition of control consummated as proposed and exercised subject to the conditions to be imposed by our order herein, does not involve the consolidation of such carriers into a single system for ownership and operation. It is not enough to constitute such a consolidation that the carriers or their properties be consolidated into a single system for operation, or for management, or for management and operation, but it must also appear that they are consolidated for ownership. Since each of the carriers will retain its corporate identity and the legal title to its property, no consolidation of the kind defined by the statute will result. (Id. 524–525.)

It may be that the language contained in the provision last above quoted is sufficient to include a merger, properly so called, but we submit that it is not sufficient to bring within the term "consolidation" a change in control over the property of a common carrier, by the execution of a lease or the purchase of stock, which is not accompanied by a corresponding change in the title to the physical and other property involved.

Because of the matters above set forth, we respectfully submit that appellants' contention, that the doing of the things authorized by the order to be done will constitute a consolidation of the carriers

involved into a single system for ownership and operation, is unsound and can not be sustained by the court.

IV.

THE APPLICATION FILED IN THE OFFICE OF THE COMMISSION WAS A SUFFICIENT BASIS FOR THE ACTION THEREAFTER TAKEN BY THE COMMISSION, INCLUDING THE MAKING AND ENTERING OF THE ORDER.

Subdivisions 11 and 14 of Paragraph X of the bill of complaint read as follows:

> 11. The said order was entered pursuant to the application of the Central alone, and, in so far as it purports to approve and to authorize the acquisition by the River Road of the control of the property of the Junction under a lease, said order is unlawful and void in that no application has been made to the Commission by either the River Road or the Junction seeking the approval and authorization of such acquisition. (Rec. 9.)
>
> 14. The said order was entered pursuant to the application of the Central alone, and, in so far as it purports to approve and to authorize the leasing of the properties (owned and leased) of the Junction to the River Road, it is unlawful and void in that no application has been made to the Commission by either the River Road or the Junction for a certificate that the present or future public convenience and necessity require, or will require, the acquisition and operation by the River Road of the properties operated by the Junction on May 16, 1922. (Rec. 9.)

For reasons set forth under point I of this brief, wherein we called attention to the obvious fact that,

in making the order, the Commission acted under authority conferred upon it by paragraph (2) of section 5 of the interstate commerce act, an extended discussion of the subject matter of the subdivision last above quoted is not necessary and would not be appropriate.

The subject matter of the other subdivision quoted is covered by paragraph (2) of section 5 of the act, hereinbefore quoted, and an examination thereof will show the pertinent words to be, "upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act." It will be observed that the right of the Commission to make an order like the one under consideration here does not depend upon whether every carrier to be named in the order has filed in the office of the Commission an application relating to the subject matter of the order. The filing of such an application by one of the interested carriers is sufficient.

However, if an application by all the interested carriers were found to be necessary, the court would have no difficulty in ruling that the application involved in this case is sufficient, because, as hereinbefore stated, the Chicago River & Indiana Railroad Company and the Chicago Junction Railway Company appeared by their counsel in the proceeding before the Commission, and that they urged favorable action by the Commission upon the application which had previously been filed in the Commission's office by the New York Central Railroad Company will not be denied by appellants.

V.

N STATING ITS CONCLUSION THAT THE DOING OF E THINGS AUTHORIZED BY THE ORDER TO BE DONE LL BE IN THE PUBLIC INTEREST, THE COMMISSION MPLIED FULLY WITH THE REQUIREMENTS OF PARA-APH (2) OF SECTION 5 OF THE INTERSTATE COM-RCE ACT.

Subdivision 12 of Paragraph X of the bill of com-int reads as follows:

> The order of the Commission of May 16, 1922, approving the acquisition as described therein, was made with the specific finding "Subject to the observance of the above conditions, we find that the acquisition by the Central of the capital stock of the River Road, and the leasing to the River Road of the properties (owned and leased) of the Junction, will be in the public interest." The finding of the Commission does not comply with the provisions of paragraph (2) of Section 5 of the Interstate Commerce Act, which require the Commission to be of opinion that the acquisition of control approved by the Commission "will be in the public interest." (Rec. 9.)

If, by the use of the language quoted, appellants tended to convey the idea that because the Com-ission's finding concerning public interest is modi-d by the words "subject to the observance of the ove conditions," we are unable to see how the sition thus taken by them can be sustained. The nditions referred to were prescribed and made a rt of the order by the Commission under the au-

thority conferred upon it by said paragraph (2), as hereinbefore shown, and are therefore as much a part of the order and as binding upon the carriers named therein as are the words which are directly connected with the permission granted by the Commission to said carriers and complained of by the appellants.

VI.

THE FACT THAT THE TIME WITHIN WHICH THE ORDER WAS TO TAKE EFFECT WAS NOT SPECIFICALLY STATED THEREIN DID NOT RENDER THE ORDER INVALID.

Subdivision 13 of Paragraph X of the bill of complaint reads:

> By paragraph (2) of section 15 of the interstate commerce act, except as otherwise provided therein "all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than 30 days, and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, etc." The order of May 16, 1922, did not prescribe the day upon which the same should take effect; for that reason the said order is null, void, and of no effect. (Rec. 9.)

A contention the same in principle as that here made by appellants was involved in the case of *New York Cent. & H. R. R. Co. et al.* v. *Interstate Commerce Commission*, 168 Fed. 131, and in ruling it to be without merit the court said:

The first ground of invalidity urged is that the order fails to specify the time during which it shall remain in force. Section 15 of the interstate commerce act as amended, under which this order was made, provides that:

> "All orders of the Commission, except orders for the payment of money, shall * * * continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission."

The Commission did not state in this order how long it should remain in force. Strictly speaking, the directions of the statute were not complied with. Nevertheless, we think that this inaction on the part of the Commission did not invalidate the order. The act itself prescribes the maximum time an order can remain in force. The Commission may prescribe a shorter time, but, in the absence of such limitation, an order remains in force the maximum time—two years. The law reads the limitation into it. * * * (Id. 134–135.)

Under the ruling of the court above set forth, the order would become effective at the end of thirty days after it was issued, if a different effective date were not named therein, by virtue of the provisions of paragraph (2) of section 15 of said act. The subsequent amendment of this statute has not changed the application thereto of the principle announced in this decision.

VII.

THE FACT THAT A LEASE COVERING THE PROPERTIES OWNED AND LEASED BY THE CHICAGO JUNCTION RAILWAY COMPANY WAS NOT SUBMITTED TO OR APPROVED BY THE COMMISSION DOES NOT RENDER THE ORDER INVALID.

Subdivision 15 of Paragraph X of the bill of complaint reads:

> The said order, in so far as it purports to approve and to authorize the leasing of the properties (owned and leased) of the Junction to the River Road is unlawful and void in that no lease of the railroad properties (owned and leased) of the Junction to the River Road executed by the parties thereto has been submitted to, or been approved by, the Commission. (Rec. 9–10.)

As hereinbefore shown, the Commission by order simply authorized the making of the lease referred to, in accordance with the power conferred upon it by paragraph (2) of section 5 of said act, and, since the execution of the lease would naturally follow the making of the order, we think it is obvious that the validity of the action taken by the Commission in making the order can not be made to depend in any way upon things which are to be done after the order is issued.

For the reasons above set forth we insist that the appeal in this case should be dismissed.

P. J. FARRELL,
For Interstate Commerce Commission,
Appellee.

JANUARY, 1924.

○

FILED
JAN 15 1924
WM. R. STANSBU
CLERK

IN THE

Supreme Court of the United States.

No. 489

THE B. & O. RAILROAD COMPANY ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA ET AL.,
Appellees.

BRIEF ON BEHALF OF THE APPELLEES, THE CHICAGO JUNCTION RAILWAY COMPANY, THE CHICAGO JUNCTION RAILWAYS & UNION STOCK YARDS COMPANY AND RICHARD FITZGERALD, APPELLEES.

SILAS H. STRAWN,
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FREDERICK C. HACK,
Solicitors for said Appellees.

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GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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I.

STATEMENT.

This statement is limited solely to the recital of such facts as are necessary to present clearly the defense of the above named appellees,—The Chicago Junction Railway Company (hereinafter called the "Junction Company"), The Chicago Junction Railways & Union Stock Yards Company (hereinafter called the "Holding Company") and Richard Fitzgerald.

As appears from the record, the New York Central Railroad Company filed an application with the Interstate Commerce Commission, under the provisions of

paragraphs (18) to (20) of Section 1 and of paragraph (2) of Section 5 of the Interstate Commerce Act as amended, for authority to acquire the shares of stock of another railroad company, to wit, The Chicago River & Indiana Railroad Company (hereinafter called the "River Road"), and for permission to acquire by lease for said "River Road" the railroad of the appellee, the "Junction Company."

At the time of the application, the appellee, the "Junction Company," was a common carrier organized under the laws of the State of Illinois and operating a railroad located wholly in Cook County, Illinois.

The "River Road" was also a common carrier organized under the laws of the State of Illinois and owning and operating a railroad located wholly in Cook County, Illinois.

The appellee, the "Holding Company," was a New Jersey corporation. It owned all of the shares of stock of the "Junction Company" and fifty per cent of the shares of stock of the "River Road."

The appellee, Richard Fitzgerald, was a citizen of Chicago, Illinois. He owned the other fifty per cent of the shares of stock of the "River Road."

The appellants intervened in the proceeding before the Interstate Commerce Commission and opposed the petition of The New York Central Company.

The Interstate Commerce Commission, after an investigation and hearing entered an order (*solely under the provisions of paragraph* (2) *of Section* 5 of the Interstate Commerce Act), approving the acquisition by The New York Central of the shares of stock of the "River Road" and approving the lease to the latter company of the railroad of the "Junction Company."

The order was merely "negative" as to the appellants and "permissive" as to appellees.

It did not impose any obligation upon either The New York Central to buy, or upon either the "Holding Company" or Fitzgerald to sell, or upon the "Junction Company" or "River Road" to lease.

The bill asserts that thereafter The New York Central purchased from the "Holding Company" and from Fitzgerald, all of the shares of stock of the "River Road" and that the latter company acquired by lease the railroad of the "Junction Company."

After these transactions had been consummated (as the bill asserts) about a year, the appellants filed their bill of complaint in this proceeding in the District Court for the Eastern Division of the Northern District of the State of Illinois.

As stated in the bill of complaint, the jurisdiction of the court is predicated solely upon the provisions of Chapter 32 of the "Urgent Deficiency Appropriations Act," approved October 22, 1913.

The jurisdiction of the court is not asserted or claimed for any other reason.

In their prayer for relief complainants asked simultaneously for a decree against the United States, setting aside the order of the Commission; also for a decree against these appellees, setting aside the sale by the "Holding Company" and Richard Fitzgerald of their shares to the New York Central; also for a decree setting aside the lease from the "Junction Company" to the "River Road"; also for the restoration to office of the former officers and directors of the "River Road"; and also for the restoration to the "Junction Company" of the railroad formerly owned and operated by it.

In the District Court the three appellees, to wit, the "Junction Company," the "Holding Company" and Richard Fitzgerald (together with all the other appellees) filed their general and special motions to dismiss, for the reasons set out therein.

Upon the hearing, the motions of all the appellees were granted and the appellants appealed.

The appellees now come here respectfully insisting—

(1) That the order of the District Court dismissing the bill as to all of the defendants should be affirmed.

(2) That, irrespective of what the court may decide as to the propriety of the order with respect to the other appellees, in any event the order of the court dismissing the bill as to these appellees should be affirmed.

In view of the fact that the other appellees, to wit, the United States, the Interstate Commerce Commission and The New York Central Railroad Company are all present in court and represented by able counsel, appellees, the "Junction Company," the "Holding Company" and Fitzgerald will endeavor (so far as possible) to confine themselves solely to the proposition that as to them, there was no error in the order of dismissal.

POINTS AND BRIEF.

I.

THE ORDER IS WHOLLY NEGATIVE AS TO THE APPELLANTS, AND MERELY PERMISSIVE AS TO THE OTHER RESPONDENTS AND THEREFORE NOT SUBJECT TO ATTACK.

Pennsylvania R. R. v. *United States Labor Board*, U. S. Sup. Ct., decided February 19, 1923.

Proctor & Gamble v. *United States*, 225 U. S. 282.

United States v. *Illinois Cent. R. R. Co.* 244 U. S. 82 (89).

II.

THE "URGENT DEFICIENCY APPROPRIATIONS ACT" DOES NOT PERMIT A SUIT TO BE BROUGHT, AND THERE IS NO LEGISLATION UNDER WHICH A SUIT MAY BE BROUGHT, SEEKING IN THE SAME ACTION—

(1) TO SET ASIDE, AS AGAINST THE UNITED STATES, AN ORDER OF THE INTERSTATE COMMERCE COMMISSION; AND

(2) GENERAL EQUITY RELIEF AGAINST DEFENDANTS OTHER THAN THE UNITED STATES.

Urgent Deficiency Appropriations Act, Sec. 1; *Commerce Court Act*, Secs. 4 and 5.

Louisiana v. *McAdoo*, 234 U. S. 627.

Ill. Cent. R. R. Co. v. *State Public Utilities Commission*, 245 U. S. 493 (503 and 505).

III.

THE APPELLANTS HAVE NO LITIGABLE INTEREST IN THE SUBJECT MATTER OR IN THE ACTS ALLEGED IN THE BILL TO HAVE BEEN PERFORMED BY THESE APPELLEES OR ANY OF THEM.

Edward Hines Yellow Pine Trustees, et al. v. *United States* (U. S. Sup. Ct.), decided November 12, 1923.

Railroad Company v. *Ellerman*, 105 U. S. 166.

Diffenbaugh v. *Union Pacific R. R. Co.* 176 Fed. 409 (modified and affirmed 222 U. S. 42).

The Golconda Northern Railway Co. v. *Gulf Lines Connecting Railroad of Illinois*, 265 Ill. 194 (citing *Railroad Co.* v. *Ellerman*, 105 U. S. 166.

The People v. *General Electric Railway Company*, 172 Ill. 129.

Many other cases in the state courts.

IV.

EVEN IF THE ALLEGED ACTS OF THE APPELLEES HAD NOT BEEN ASSENTED TO BY THE UNITED STATES THROUGH THE INTERSTATE COMMERCE COMMISSION, AND,—

EVEN IF IT BE ASSUMED THAT SUCH ACTS, WITHOUT SUCH CONSENT, WOULD BE IN VIOLATION OF THE ANTI-TRUST ACTS, NEVERTHELESS THE APPELLANTS (NOT HAVING ANY LITIGABLE INTEREST) WOULD NOT BE PERMITTED TO MAINTAIN THIS ACTION AGAINST THE APPELLEES WHO ARE NOT COMMON CARRIERS.

UNDER SUCH CIRCUMSTANCES SUCH AN ACTION COULD ONLY BE MAINTAINED BY THE UNITED STATES.

THE PROVISO TO SECTION 16 OF THE CLAYTON ACT PROHIBITS SUCH A SUIT AGAINST THE COMMON CARRIER APPELLEES.

Minnesota v. *Northern Securities Co.* 194 U. S. 48.

Paine Lumber Co. v. *Neal,* 244 U. S. 459, 471 (1916).

Duplex Printing Press Co. v. *Deering, et al.* 254 U. S. 443, 465 (1921).

Geddes v. *Anaconda Mining Co.* 254 U. S. 590, 593 (1921).

38 U. S. Stat. at Large, Ch. 38, Sec. 16.

V.

EVEN IF THE ACTS OF THE CORPORATE APPELLEES WERE ULTRA VIRES, THE APPELLANTS NOT BEING STOCKHOLDERS COULD NOT MAINTAIN THIS ACTION AGAINST THESE APPELLEES.

Railroad Company v. *Ellerman, supra.*

Peru Plow & Implement Co. v. *Harker,* 144 Fed. 673.

Belcher Sugar Refining Co. v. *St. Louis Grain Elevator Co.* 13 S. W. 822.

C. M. & G. Co. v. *C. N. G. Co.* 40 Pac. 326.

Many other decisions in the State Courts.

VI.

THE RIGHT OF ACTION GIVEN UNDER SUBDIVISION (20) OF SECTION 1 OF THE ACT TO REGULATE COMMERCE, DOES NOT OBTAIN WITH RESPECT TO ACTS AND TRANSACTIONS UNDER SUBDIVISION 2 OF SECTION 5 OF THE ACT TO REGULATE COMMERCE.

The language in subdivision (20) of Section 1 is:

"* * * any construction, operation * * * contrary to the provisions * * * of paragraphs 18 and 19 *of this section* may be enjoined * * * at the suit of * * * any party in interest."

There is no such language in Section 5.

Interstate Commerce Act, Secs. 1, 5.

ARGUMENT.

I.

THE DECREE OF THE COURT BELOW SHOULD BE AFFIRMED AS TO THESE APPELLEES BECAUSE THE ORDER OF THE INTERSTATE COMMERCE COMMISSION, BEING MERELY "NEGATIVE" AS TO THE APPELLANTS AND "PERMISSIVE" AS TO THE APPELLEES, IS NOT OPEN TO ASSAULT BY ANYONE.

The order of the Commission did not impose any duty upon The New York Central Railroad Co. to acquire the "River Road" stock, or upon the owners of the stock to sell the same. It did not impose any duty upon the "Junction Company" to lease its road to the River Road, or upon the "River Road" to acquire the same.

As was said by this court, referring to the "Labor Board Act" in *Pennsylvania Railroad Co.* v. *U. S. Labor Board*, decided February 19, 1923:

> "Under the act there is no constraint upon them (referring to the two contending parties) to do what the board decides they should do, except the moral constraint already mentioned, of publication of its decision. * * * All that we may do in this case is to hold, as we do, that they (referring to the decisions of the Labor Board) were within the lawful function of the board to render, and *not being compulsory*, violate no legal or equitable right of the complaining company."

In view of the fact, however, that this point has been elaborately argued by the United States, these appellees adopt as their own, the argument of counsel for the Government on this point and do not further elaborate the same.

See other authorities under Point I of our brief.

II.

THE DECREE OF THE COURT BELOW AS TO THESE APPELLEES SHOULD BE AFFIRMED BECAUSE UNDER THE "URGENT DEFICIENCY APPROPRIATIONS ACT" THESE APPELLEES MAY NOT BE SUED JOINTLY WITH THE UNITED STATES IN A SUIT TO SET ASIDE AN ORDER OF THE INTERSTATE COMMERCE COMMISSION.

To state the proposition is to demonstrate it.

As was said by this court in *Louisiana* v. *McAdoo*, 234 U. S. 628,—

> "No principle is better established than that the United States may not be sued in the courts of this country without its consent."

If it be true that the United States may not be sued without its consent, it necessarily follows that it is equally true that it cannot be sued jointly with third parties without its consent.

There is no such consent for such a joint suit in the *"Urgent Deficiency Appropriations Act."*

In *Illinois Central* v. *Public Utilities Commission*, 245 U. S. 493, suit was brought by the Illinois Central Railroad Company against the Public Utilities Commission of Illinois, in the Eastern Division of the Northern District of the State of Illinois. Thereupon the Commission filed a cross bill assailing certain orders of the Interstate Commerce Commission, which were supposed to be involved in the original suit, and making the United States party defendant. Later the United States was dismissed out of the case.

Referring to the cross bill which had been filed against the Commission, this court said, p. 504:

> "By statute such suits are required to be brought against the United States * * * only in designated districts. Here the Eastern District of

Missouri was the one designated. * * * The United States had consented to be sued there, but not elsewhere, and being suable only by its consent, could not be sued in the district (to wit, Illinois) within the consent given. * * *

No doubt there are situations in which a cross bill against an ordinary suitor may be considered and dealt with in virtue of the jurisdiction over the principal suit, even though as an original bill it could not be entertained. * * * But *it is otherwise* where the cross bill is against the United States, for no suit against it can be brought without its consent given by law. Its immunity recognizes no distinction between cross bills and original bills or between ancillary suits and original suits, but extends to suits of every class.

* * * The claim is made that in any event the cross bills should have been retained as to the defendants therein other than the United States, *but this is not an admissible view.* As before indicated, the United States is made by statute a necessary party to the suit to set aside an order of the Commission and this means that it is to stand in judgment as representing the public." * * *

This being the law with respect to the United States, it necessarily follows that the United States may not be sued *jointly* with other defendants *without its consent* given by law, and also that other defendants may not be sued jointly with the United States against their will *without a law to that effect.*

Section 4 of the *"Commerce Court Act"* which is incorporated into the *"Urgent Deficiency Appropriations Act"* provides—

> "that all cases * * * which but for this act, would be brought by or against the Interstate Commerce Commission, *shall be brought by or against the United States."*

Section 5 of the Act provides—

(1) That "the Attorney General shall have

charge and control of the interest of the Government in all cases * * *, etc."

(2) that "the Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission *may appear* as parties and be represented by their counsel in any suit wherein is involved the validity of such order and the interest of such party." * * *

It is obvious that this provision gives the right to a third party whose interests are involved, to intervene. But it does not give the right to the complainant *to make such third party defendant against such third party's will.*

(3) Section 5 further provides that—

"Communities * * * corporations * * * who are interested in the controversy or question before the Interstate Commerce Commission * * * *may intervene in said suit.*" * * *

It is obvious that this provision also relates to the rights of third parties (communities or corporations) to voluntarily appear in the suit assailing the order, but it does not confer upon the complainant the right to join *third parties against their will,* as defendants, with the United States.

(4) Section 5 further provides that—

"complainants before the Interstate Commerce Commission shall have the right to appear and be made parties to the case," etc. * * *

but this provision does not confer the right upon any firm or corporation assailing the order of the Commission, to compel the complainants or any party other than the United States to appear before the Commission against such party's will.

The act provides that persons desiring to attack the Commission must sue the United States. *It does not confer upon such litigants the right to institute general equity actions seeking general equity relief against other defendants.*

Nevertheless, that is the relief which the appellants in the case at bar have sought against the appellees, the "Holding Company," the "Junction Company" and Richard Fitzgerald.

In view of the fact that the bill does not predicate any jurisdiction upon the subject matter, or parties thereto, except under the *"Urgent Deficiency Appropriations Act"*; and in view of the fact that even if it did, the bill upon its face shows that it is a suit, among other things, brought by citizens of the States of Indiana, Michigan and Pennsylvania against a citizen of the State of Pennsylvania and Indiana, it is evident that even if an attempt were made to predicate the bill upon diversity of citizenship, that by its own terms it must fail.

These appellees, therefore, respectfully submit that even if this court should hold that the order of the Commission is an assailable order, and that the bill may be maintained by the appellants against the United States, under the provisions of the *"Urgent Deficiency Appropriations Act,"* it must, nevertheless, be dismissed as to these appellees and the order in that respect should be affirmed for want of jurisdiction.

III.

EVEN IF THE COURT SHOULD HOLD THAT THE ORDER ENTERED BY THE INTERSTATE COMMERCE COMMISSION IS A LITIGABLE ORDER AND THAT THERE IS NO MISJOINDER OF PARTIES, NEVERTHELESS, THE ORDER OF THE COURT BELOW SHOULD BE AFFIRMED AS TO ALL OF THE APPELLEES BECAUSE THE APPELLANTS HAVE NO LITIGABLE INTEREST AS AGAINST THE UNITED STATES.

The real grievance which led the appellants to file their bill of complaint in the District Court appears in paragraph XII of the bill as amended. (Rec., 53.) This paragraph reads as follows:

> "'Plaintiffs further show that the River Road and the Junction, on May 15, 1922, were, and prior to that date always had been, neutral belt railroads uncontrolled by any trunk line carrier and as such were used by all railroads entering Chicago, impartially and without discrimination; that prior to May 16, 1922, the plaintiffs herein competed for traffic originating at points of origin on, or destined to points of delivery on, the said River Road and the Junction on equal terms with the Central without either the plaintiffs or the Central having any advantage in the securing of said traffic by reason of having an ownership or control of the said River Road and/or the said Junction; that the acquisition of control approved and authorized by the Commission in its order of May 16, 1922, substitutes monopoly of control and operation for the neutral control and operation of the Junction and River Roads which prior to May 16, 1922, served alike all railroads reaching Chicago, including the plaintiffs herein and the Central; that practically all of the tonnage originating at or destined to points on the Junction and the River Roads is competitive tonnage in that the same could be hauled either over the lines of railroad constituent parts of the New York Central System or over the lines of one or more of your plaintiffs; that the control of a belt

line by one line-haul carrier gives that line-haul carrier substantial advantages in the securing of competitive tonnage to the consequent disadvantage of competing line-haul carriers not having such control; that in cases where the shippers on the River Road and the Junction have failed to direct the route of movement of their shipments consigned to points which are served by the Central or by lines of railroad constituent parts of the New York Central System, directly or through its or their connections, as well as by the plaintiffs herein, directly [fols. 107 & 108] or by their connections, it is and since May 16, 1922, has been the practice of the officials, agents and employes of the River Road and the Junction to route said shipments via the line of the Central and via the lines of carriers constituent parts of the New York Central System to the exclusion of routing any of said shipments via the lines of the plaintiffs herein; that the acquisition of control approved and authorized by the Commission in its said order has curtailed, and so long as it continues to exist, will, greatly curtail the ability of the plaintiffs to secure the competitive traffic of shippers located upon the lines of the Junction and the River Road for the reason that subsequent to May 16, 1922, it has been, now is, and will be the practice of shippers located on the said railroads to give preference to cars of the Central (which, under the order complained of, has the control of the said roads) to the exclusion of cars of the plaintiffs, its competitors, and to route their shipments via the line of the Central and via the lines of railroad constituent parts of the New York Central System in lieu of routing said shipments via the lines of the plaintiffs herein; that the diversion of tonnage from the rails of the plaintiffs to the rails of the Central or other routes of the New York Central System, consequent upon the facts above related has resulted in a large loss of traffic and of revenue to the plaintiffs, to their irreparable loss and injury, in an amount exceeding $10,000,000; and that the loss in net earnings to plaintiffs which will result from the continued control acquired under the said order of the Commission will approximate $10,000,000 per annum so long as said control continues."

Of course, in making the foregoing allegations, the complainants entirely overlook the conditions upon which the purchases were allowed by the Interstate Commerce Commission. (Rec., 22-23.)

> "*Condition* 1 *is as follows:* The Central will be required to maintain a separate corporate identity and organization for the combined properties of the Junction and River Road so that the two shall constitute a separate operating entity with a responsible management located in Chicago in order to preserve for the shipper the present direct access to the railroad officials.
>
> *Condition* 2 *is as follows:* The present neutrality of handling traffic in and outbound by the Junction and River Road organization shall be continued so as to permit equal opportunity for service to and from all trunk lines reaching Junction rails, without discrimination as to routing or movement of traffic which is competitive with the traffic of the Central, and without discrimination against such competitive traffic in the arrangement of schedules.
>
> *Condition* 3 *is as follows:* The present traffic and operating relationships existing between the Junction and River Road and *all carriers* operating in Chicago shall be continued, in so far as such matters are within the control of the Central.
>
> *Condition* 7 *is as follows:* The Junction shall accept, handle and deliver all cars in and outbound, loaded and empty, without discrimination in promptness or frequency of service as between cars destined to or received from competing carriers and irrespective of destination or route of movement."

These obligations imposed upon the New York Central are incorporated in the record and leave paragraph 12 of the bill of complaint shorn of such little, if any, legal weight or effect as it had.

But let us suppose that the conditions contained in the Commission's order did not appear in the record. Even in such an event paragraph 12 of the bill of complaint

as amended, stripped of all superfluous verbiage, means merely that the complainants complain because:

> "by the far-sightedness of the New York Central, they (the complainants) will find competition with the New York Central more difficult than they have hitherto found it."

They do not contain a single averment showing *any interference* by the New York Central with any *legal* right which the complainants, or any of them, have or had.

Were it not for the language of this court in *Edward Hines Lumber Co., supra,* it might be permissible (even if not necessary), to develop this point further and to point out that, so far as the rights, if any, of the appellants as carriers are concerned over traffic originating on the rails of the Junction Company; those rights are amply protected by other provisions of the Interstate Commerce Act. 3 *and* 4. *Section* 3 *Interstate Commerce Act.*

However, in view of the language used by this court in the *Hines* case *supra,* the appellees respectfully submit that an elaboration of these points is wholly unnecessary.

In the *Hines* case this court said:

> "But the plaintiffs could not maintain this suit merely by showing (if true) that the Commission (the Interstate Commerce Commission) was without power to order the penalty charges canceled. They must show also that the order alleged to be void subjects them to *legal injury,* actual or threatened. This they have wholly failed to do. It is not alleged that the carriers wish to impose such charges, and, but for the prohibition contained in the order, would do so. For aught that appears carriers are well satisfied with the order entered. *Cancellation of a charge by which plaintiffs' rivals in business have been relieved of the handicap theretofore imposed, may conceivably have subjected*

plaintiffs to such losses as are incident to more effective competition. * * *

The further claims of the plaintiffs are, if possible, even more unsubstantial. They fear that, by reason of the order, they may, in the future, suffer in times of car shortage through the greater use of cars for storage. They fear that the equipment to be used in connection with the railroad which they expect to operate may be diverted, at some time in the future, from transportation uses. If their fears are realized, it will be open to them to apply to the Commission for relief. As the plaintiffs do not show any interest which entitles them to sue, we have no occasion to consider either the power of carriers to impose the penalty charge, or the power of the Commission to order its cancellation."

In *Diffenbaugh* v. *Union Pacific R. R. Co.* 176 Fed. 409 (417), in discussing the nature of the "interest" which a party must have in order to attack an order of the Interstate Commerce Commission, Judges Sanborn, Hook and Adams said:

"The determination of the question what parties may maintain such suits is left by the Interstate Commerce Act to the general rules and practice in equity, and under them any party whose *rights of property* are in danger of *irreparable injury from an* unauthorized order of the Commission may appeal to a federal court of equity for relief."

This language of the circuit judges was adopted by this court in its opinion in *222 U. S. 42*, where, with respect to the foregoing language of the circuit judges, this court said:

"The jurisdiction in the *Diffenbaugh* case was doubted. * * * We are content to leave that matter *on the statement of the court below.*"

In *Railroad Company* v. *Ellerman*, 105 U. S. 166, *supra*, Ellerman entered into a contract with the City of New Orleans by which the latter granted to him for a

term of years certain rights with respect to the city's wharves and levees.

Defendants were by contract permitting third parties to conduct a wharf on the property of the defendants without, as Ellerman claimed, any franchise right so to do and in violation (as Ellerman claimed) of Ellerman's grant from the city. Thus the attack made by Ellerman was twofold—

First. That the defendants had no lawful right to do what they were doing.

Second. That what the defendants were doing was a violation of Ellerman's right and resulted in the conduct of a business which was in competition with a business conducted by him under his grant from the city.

The Circuit Court of the United States granted a decree in his favor. In reversing it this court said:

> "The sole remaining question then, is, whether Ellerman, as assignee of the city, has any legal interest which entitles him to enjoin the company from using its wharf as a public wharf beyond the limits of such use, as defined by that construction of the joint resolution. If he has such interest, it can only consist in preventing competition with himself as a wharfinger, which such more extensive use of the railroad property would create. And if the right to assert it exists, it must rest, not upon the claim that the premises are thus used for purposes to which they might not be lawfully devoted if owned and used by a natural person, *but on the allegation merely that such use is beyond the corporate powers of the company. But if the competition in itself, however injurious, is not a wrong of which he could complain against a natural person, being the riparian proprietor, how does it become so merely because the author of it is a corporation acting ultra vires. The damage is attributable to the competition, and to that alone. But the competition is not illegal.* It is not unlawful for anyone to compete

with the company, although the latter may not be authorized to engage in the same business. The *legal interest which qualifies a complainant other than the State itself to sue in such a case is a pecuniary interest in preventing the defendant from doing an act where the injury alleged flows from its quality and character as a breach of some legal or equitable duty.* A stockholder of the company has such an interest in restraining it within the limits of the enterprise for which it was formed, because that is to enforce his contract of membership. The State has a legal interest in preventing the usurpation and perversion of its franchises, because it is a trustee of its powers for uses strictly public. In these questions the appellee has no interest, and he cannot raise them in order, under that cover, to create and protect a monopoly which the law does not give him. *The only injury of which he can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right. If he asserts that the competition of the railroad company damages him, the answer is, that it does not abridge or impair any such right.* If he alleges that the railroad company is acting beyond the warrant of the law, the answer is, that a violation of its charter does not of itself injuriously affect any of his rights. The company is not shown to owe him any duty which it has not performed." (Italics are ours.)

In *Golconda Northern Railway Company* v. *Gulf Lines Connecting Railroad of Illinois,* 265 Ill. 194, a controversy arose between two railroad companies with respect to the construction and the operation of a railroad through a narrow pass.

The Golconda Company, claiming to be in possession of the pass, filed a bill for an injunction to restrain the Gulf Lines Connecting Company from interfering with, obstructing or hindering the former in the construction of its road. The lower court entered a decree dismissing the bill. In affirming the decree the Supreme Court of Illinois said, at pages 205 and 206:

"The appellant has no such interest as entitled

it to enjoin the appellee from constructing a railroad in this pass. The only injury of which it can complain in a judicial tribunal is the invasion of some legal or equitable rights. It alleges that the appellee is acting beyond its authority under the law because the conveyance under which it claims was beyond the charter power of its grantor to make. This conveyance, however, did not injuriously affect any right of the appellant, and it has, therefore, no ground to complain. *Neither the Toledo, St. Louis and New Orleans Railroad Company nor the appellee owed any duty to the appellant in regard to this land or to the title thereto. A stockholder in the grantor company might have an interest in restraining it within the limits of its corporate powers and the State might have an interest in preventing the usurpation and perversion of its franchises, but the appellant has no interest in these questions and cannot raise them to enable it to seize the property* which is the real subject matter of the controversy. (Citing *New Orleans, Mobile & Texas Ry. Co.* v. *Ellerman*, 105 U. S. 166.)" (Italics are ours.)

IV.

IRRESPECTIVE OF THE DECISION OF THIS COURT AS TO ANY OTHER POINTS IN THE CASE, THE DECREE OF THE COURT BELOW IN FAVOR OF THESE APPELLEES MUST BE AFFIRMED BECAUSE, AS AGAINST THESE APPELLEES, THE APPELLANTS HAVE NO LITIGABLE INTEREST WHATSOEVER.

(1)

A discussion of this proposition necessarily involves an analysis of the difference between the scope of Subdivision (2) of Section 5 and of Subdivision (18) of Section 1 of the Act to Regulate Commerce.

Subdivision (2) of Section 5 refers to the acquisition "to the extent indicated by the Commission" by one carrier of another (both being already in existence), either by—

(a) the purchase of stock, or

(b) under a lease, and not otherwise.

Subdivision (18) of Section 1 apparently refers to the acquisition or construction by one carrier of a "new line of railroad." In any event it has nothing to do with the acquisition by lease or stock ownership of one carrier by another referred to in subdivision (2) of Section 5 or to the consolidation by other methods provided for in subdivision (6) of Section 5.

In the case at bar the Commission gave its approval to the acquisition by the New York Central of the stock of the "River Road" and of a lease of the "Junction Company," pursuant to the provisions of Subdivision (2) of Section 5.

By getting this order the New York Central also obtained the immunity provided for in subdivision (8) of Section 5 which is as follows:

> "The carriers affected by any order made under the foregoing provisions of this section * * *

> shall be • • • relieved from the operation of the Anti-Trust Laws • • • and of all other restraints or prohibitions by law, state or federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section."

However—to put the proposition for which the appellees are now contending in its most acute form—*let us suppose that the New York Central had acquired the stock of the "River Road" and the latter had acquired the lease of the "Junction Company" without the consent of the Interstate Commerce Commission.*

What then would have been the rights of the appellants to maintain this action as against the appellees?

It is respectfully submitted that they would have had no rights whatsoever.

Even under the Clayton Act, the right to enforce prohibitions of the anti-trust act against private parties is not vested in private parties unless some litigable interest of the latter is affected by the alleged violation.

Under such circumstances it rests only in the United States.

> (*See authorities cited under Points III-IV, supra.*)

As to common carriers, it is expressly provided in the proviso to Section 16 of the Clayton Act that no suit may be maintained against them.

> (*See 38 Stat. at Lar., ch. 38, p. 737, proviso to Section 16.*)

This question is so well settled as to need no further consideration here.

(2)

So far as state legislation is concerned, acquisition by the New York Central of the stock and by the "River Road" of the lease at the worst would have been only ultra vires the corporations.

No claim is made by the appellants that the acquisition of the stock and of the lease aforesaid was *ultra vires* the corporations under State legislation. As a matter of fact, such a claim, if made, would have been wholly without foundation. The statutes of the State of Illinois, under which the New York Central, the "Junction Company" and the "River Road" are organized, contain ample authority for the acquisition of the stock and lease aforesaid.

However—to again put the proposition in its most acute form and in the form most favorable to the appellants—let us suppose that the acquisition by The New York Central was *ultra vires* under the laws of the states under which The New York Central and the "River Road" and the "Junction Company" had been organized.

The law is well settled that no one can raise the question of *ultra vires* except either the state or a stockholder.

As was said in *Ellerman* v. *R. R. Co. supra,* p. 173:

> "The *legal interest which qualifies a complainant other than the State itself to sue in such a case is a pecuniary interest in preventing the defendant from doing an act where the injury alleged flows from its quality and character as a breach of some legal or equitable duty.* A stockholder of the company has such an interest in restraining it within the limits of the enterprise for which it was formed, because that is to enforce his contract of membership. The State has a legal interest in preventing the usurpation and perversion of its franchises, because it is a

trustee of its powers for uses strictly public. In these questions the appellee has no interest, and he cannot raise them in order, under that cover, to create and protect a monopoly which the law does not give him. The only injury of which he can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right. If he asserts that the competition of the railroad company damages him, the answer is, that it does not abridge or impair any such right. If he alleges that the railroad company is acting beyond the warrant of the law, the answer is, that a violation of its charter does not of itself injuriously affect any of his rights. The Company is not shown to owe him any duty which it has not performed." (Italics are ours.)

In *Peru Power Improvement Co.* v. *Harker* (C. C. A.) 144 Fed. 673, the Circuit Court of Appeals, referring to *ultra vires* transactions, said:

"But an executed contract or conveyance is not open to collateral attack by strangers to it, upon the ground that a corporation which is a party to it was without power to make or to accept it. It may be successfully questioned by no one *but the state and those who are parties or privies to it.* (*Citing cases.*)"

In *Belcher Sugar Refining Co.* v. *St. Louis Grain Elevator Co.* (Mo.) 13 S. W. 822, the court, referring to an *ultra vires* transaction, said:

"The defendant's *stockholders and the state may* complain but the *plaintiff cannot base a cause* of action alone on any such ground. He must show that some duty owing to him is being violated before he can maintain this suit because the defendant is exceeding its charter powers. (*Citing Railroad* v. *Ellerman,* 105 U. S. 166.)"

As was said in *Coffeyville Mining & Gas Company* v. *Citizens' Natural Gas Company, supra,* 40 Pac. 326:

"A private person or corporation will not be recognized in a court of justice as the guardian of purely public interests, nor to further its private

ends by assuming that character." (Citing authorities.)

Many other state court decisions are to the same effect.

But the appellants do not even sue as stockholders. They assert no right predicated on such relationship either as to the New York Central or the "River Road" or the "Junction Company."

Neither have they asserted any right whatever with respect to the shares of stock owned by the appellee, Fitzgerald, as an individual.

As the result of these considerations the appellees submit—

(a) That while it was an undoubted advantage to The New York Central to obtain the approval of the Interstate Commerce Commission, nevertheless their failure to get such approval would not have vested any right in the appellants, under federal legislation, to assail the transaction even if consummated without such assent.

(b) Again—if consummated without such assent—the appellants, not being stockholders, would not have had the right to maintain the action even if the acquisition by The New York Central had been *ultra vires* under the laws of the states where it and the "Junction Company" and the "River Road" were organized.

(c) It therefore follows that the appellants cannot maintain the action against the appellees the "Holding Company," the "Junction Company" and Fitzgerald.

V.

CONCLUSION.

As a resumé: The appellees submit that the order dismissing the bill of complaint of the appellants as to these appellees must be affirmed for the following reasons:

1. The order of the Interstate Commerce Commission is a nonassailable order.

2. The appellees, the "Holding Company," the "Junction Company," and Fitzgerald cannot be sued jointly with the United States under the *"Urgent Deficiency Appropriations Act."*

3. If the order of the Commission is a litigable order, the appellants do not have a litigable interest even as against the United States.

4. In any event, the appellants have no litigable interest which they may assert in this proceeding against the "Holding Company," the "Junction Company" and Richard Fitzgerald.

Respectfully submitted,

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